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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

JUL 10 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

MM Docket No. 95-31

Reexamination of the Comparative)
Standards for Noncommercial)
Educational Applicants)

**PETITION FOR PARTIAL RECONSIDERATION OF
NATIONAL FEDERATION OF COMMUNITY BROADCASTERS,
CENTER FOR MEDIA EDUCATION,
CITIZENS FOR INDEPENDENT PUBLIC BROADCASTING,
CIVIL RIGHTS FORUM,
CULTURAL ENVIRONMENT MOVEMENT, and
MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL
(NFCB/CME *et al.*)**

Of Counsel:

Fernando A. Bohorquez, Jr.
Graduate Fellow
Georgetown University Law Center

Angela J. Campbell
Citizens Communications Center
Georgetown University Law Center
Institute for Public Representation
600 New Jersey Ave. N.W., Ste. 312
Washington, D.C. 20001
202-662-9546

Irene Feldman
Legal Intern
University of California at Davis
Media Access Project

Cheryl A. Leanza
Andrew Jay Schwartzman
Harold J. Feld
MEDIA ACCESS PROJECT
950 18th St., NW, Suite 220
Washington, D.C. 20006
202-232-4300

July 10, 2000

Counsel for NFCB/CME *et al.*

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SUMMARY

NCFB/CME *et al.* commend the Commission, *inter alia*, for adopting a point system instead of a lottery to select noncommercial educational broadcast licensees.

However, NCFB/CME *et al.* seek reconsideration of two aspects of the point system adopted by the Commission.

Primarily, the Commission erred in failing to award points to NCE applicants who promise to provide a minimum amount of locally-originated programming. Localism is the foundation of the nation's broadcasting system. The Commission's determination that locally-originated programming is irrelevant to the eligibility of NCE licensees is misguided, departing from well-established precedent favoring the provision of local fare. The Commission provides a wholly inadequate explanation for failing to award points for such programming. Accordingly, NCFB/CME *et al.* respectfully request that the Commission reconsider its decision and award points to NCE applicants who pledge to air locally-originated programming.

In addition, NCFB/CME *et al.* ask that the Commission reconsider its decision not to award points to NCE applicants for the provision of air time to local residents and for stations that are locally funded. Awarding points based on these additional criteria would help ensure that the applicant selected will serve the local programming needs of its community of license.

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PETITION FOR PARTIAL RECONSIDERATION

The National Federation of Community Broadcasters, along with the Center for Media Education, Citizens for Independent Public Broadcasting, Civil Rights Forum, Coalition for Noncommercial Media, Cultural Environment Movement, and Minority Media and Telecommunications Council (“NFCB/CME *et al.*”) seek partial reconsideration of the Commission’s *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, FCC 00-120, MM Docket 95-31 (rel. April 21, 2000) (“*Order*”). NFCB/CME *et al.* commend the Commission for adopting a point system rather than a lottery to award licenses, for choosing to allot the greatest number of points to local applicants and, in the event of a tie, for awarding a license to the entity that holds the fewest number of construction permits and licenses combined. These elements will help ensure that local, independent applicants will be selected in the event that mutually exclusive applications are filed. Such applicants will better serve the public interest.

Several deficiencies remain in the point system, however, that undermine the Commission’s decision. First, the Commission should reconsider its determination not to award points for locally-originated programming. Over fifty years of Commission and Congressional telecommunications policy favor the provision of locally-originated broadcast programming. The FCC’s determination that locally-originated programming is irrelevant to the selection of an NCE licensee cannot be reconciled with this historical precedent. Second, the Commission

should reexamine its decision not to award points for providing airtime to local residents and for stations that are locally funded. Awarding points based on these two additional factors would help ensure that the applicant selected will serve the local programming needs of its community of license.¹

I. THE COMMISSION SHOULD AWARD POINTS FOR LOCALLY-ORIGINATED PROGRAMMING.

The Commission concluded that it will not consider locally-originated programming when deciding among mutually exclusive applicants for noncommercial educational (“NCE”) licenses. *Order* at ¶ 66. As discussed below, our national telecommunications policy has traditionally favored locally-originated programming and the Commission’s explanation for departing from this longstanding precedent is wholly inadequate. Accordingly, the Commission should reconsider its decision and award points to NCE applicants who pledge to provide a minimum amount of locally-originated programming.

A. The Commission, Congress and the Supreme Court Have Historically Supported Policies Favoring Locally-Originated Programming.

Historically the Commission has recognized the importance of locally-originated programming as crucial to fulfilling every broadcaster’s public interest duty. As recently as August 1998 the Commission reiterated its longstanding policy that, “[s]erving the needs and interest of its community, as the Commission has long recognized, is a ‘bedrock obligation’ of every broadcast licensee.” *Main Studio Order*, 13 FCC Rcd 15691 (1998). Similarly, in the *Radio Deregulation Order* the Commission made clear that even as it allowed broadcasters

¹ Although we believe the Commission’s decision to subject non-commercial educational applicants to auctions was incorrect, we are not raising this issue here. The proper venue for its resolution is the pending petition for review submitted jointly by NPR, CPB and APTS before the U.S. Court of Appeals.

flexibility in meeting their obligations, “[we] do expect, and will require broadcasters to be responsive to the issues facing their community.”²

This principle is even more important with respect to NCE broadcast licensees. As Commissioner Tristani noted in her dissent, “[l]ocal-origination programming is one of the foundations on which the noncommercial educational service was built.” *Tristani Dissent* at 1. Traditionally, the Commission has determined that “the channels reserved for educational use are intended to serve the educational and broadcast needs of the entire community to which they are assigned.” *Fostering Expanded Use of UHF Television Channels*, 2 FCC 2d 527, 542 (1966). In the *1960 Programming Statement* the Commission explained the importance of local programming for noncommercial licensees:

The distribution of unique non-commercial, educational programming services, including those transmitted by non-commercial educational television stations serving local communities or markets, advances that interest in providing for the further education of our citizens and encouraging public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation.

Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 Rad. Reg. 1901, 1913 (1960).

Moreover, “Congress and the Supreme Court have repeatedly endorsed the preservation of local-origination programming as a legitimate and substantial governmental interest.” *Tristani Dissent* at 57. In mandating “must carry” of local broadcast stations by cable operators in the

² See *Deregulation of Radio*, 84 FCC 2d 968 (1981). See also *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076 (1984). Indeed, in the past, the Commission placed such an emphasis on local programming that it traditionally preferred broadcast applicants who proposed a greater quantity of localized programming. See, e.g., *Pinellas Broadcasting v. FCC*, 230 F.2d 204, 206 (D.C. Cir. 1956).

1992 Cable Act, Congress demonstrated its unwavering support for local programming. Congress clearly stated that a “primary objective and benefit of our Nation’s system of regulation of television broadcasting is the *local origination of programming*. There is a substantial government interest ensuring its continuation.” *Cable Television Consumer Protection and Competition Act of 1992*, 102 P.L. 385 (1992) § 2(a)(10)(emphasis added).³ Furthermore, Congress has consistently supported locally-originated and oriented programming with respect to noncommercial broadcast media.⁴

The Supreme Court has long shared Congress’ concern with the preservation of local broadcast programming. In *National Broadcasting Co.*, the Court declared that “local program service is a vital part of community life. A station should be ready, able and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.” *National Broadcasting Co. v. United States*, 319 U.S. 190, 203 (1943). Recently, the Court explained that the broadcast licensing system is premised on affording “each community of appreciable size an over-the-air source of information and an outlet for exchange *on matters of local concern*.” *Turner Broadcasting v. FCC*, 512 U.S. 622, 663 (1994) (emphasis added).⁵ In sum, “the importance of local broadcasting can scarcely be exaggerated.” *Id.*

³ See also *Community Broadcasters Protection Act of 1999*, P.L. 106-113, codified at 47 U.S.C. § 336(f)(1999) (acknowledging the contribution of LPTV to the public interest by serving the local informational needs of their communities and requiring that new LPTV Class A licenses air at least 3 hours a week of locally-produced programming).

⁴ See, e.g., 47 U.S.C. § 396(a)(8) (“public television and radio stations and public telecommunications services constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs.”).

⁵ The Supreme Court has also acknowledged the benefits of locally originated programming from a diversity standpoint, recognizing that it helps assure a multiplicity of information sources. “The Court upheld an FCC requirement that cable operators make facilities available for local

B. The Commission Failed to Adequately Explain its Departure From Longstanding Policy Favoring Locally-Originated Programming

Awarding points to NCE applicants who promise to air a minimum amount of locally-originated programming is a simple, direct way of furthering the traditional policy favoring local programming. But the Commission chose to overlook decades of policy supporting locally-originated programming and declined to include this additional factor in the NCE selection process. *Order* at ¶ 66. Moreover, the Commission’s rationale for failing to consider the amount of locally-originated programming offered by an NCE applicant is wholly inadequate. First, it determined that awarding points to an NCE applicant for providing locally-originated fare would be inconsistent with the maximum flexibility the FCC has historically afforded to broadcast licensees in determining how to address local needs. *Order* at ¶ 66. Second, the Commission concluded that although locally-originated programming may be pertinent to the selection of a LPFM or LPTV applicant, this factor was irrelevant to the eligibility of an NCE applicant. *Order* at ¶ 66. Neither purported rationale justifies the Commission’s refusal to award points to NCE applicants proposing to air locally-originated programming nor sufficiently distinguishes between LPFM, LPTV and full power NCE services.

First, awarding points for local programming is consistent with affording licensees programming flexibility. The proposal would not require NCE licensees to air locally-originated programming. Rather, if the applicant chose to provide locally-originated programming, this would be just one factor of many to be considered in the selection process. Moreover, awarding points for local programming would not dictate or limit the type of locally-originated programming a successful NCE applicant would have to provide. Many types of programming

programming production as reasonably furthering the goal of “increasing the number of outlets for community self expression.” *Tristani Dissent* at 57 (quoting *United States v. Midwest Video*

could qualify as locally-originated. Thus, the proposal would not constrict a licensee's traditional discretion in airing programming to meet its community's local needs. Instead, including points for locally-originated programming would further the purpose for which NCE broadcasters are awarded the license in the first place - to serve the local educational and information needs of their communities.

Second, the Commission erroneously concluded that local program origination was irrelevant to the selection of a full power NCE broadcast licensee. The Commission acknowledged the relevance of locally-originated programming with respect to LPFM and LPTV applicant eligibility, but distinguished these applicants from their NCE counterparts on the grounds that LPFM and LPTV "services are highly localized in nature, covering limited areas with reduced power facilities." *Order* at ¶ 66. This is a false distinction. In the recent order creating low power radio, the Commission explained that the local program origination requirement for LPFM was "derive[d] from the service requirements *for full-service broadcast stations*, which are required to maintain the capacity to originate programming from their main studios." *Creation of a Low Power Radio Service Decision*, MM Dkt. No. 99-25 at ¶ 144 (rel. Jan. 27, 2000). As Commissioner Tristani notes in her dissent, "awarding additional credit for local-origination [for LPFM applicants] was *not* based on the localized nature of the service, as the majority now asserts, but on the obligation of full power stations to maintain the ability to produce local programming." *Tristani Dissent* at 2 (emphasis in original).

Moreover, local origination requirements for LPFM, as well as LPTV, were largely based on the ability for these services to meet the needs of underserved communities. A driving force behind adopting a local program origination selection factor for LPFM was that this criterion

Corp., 406 U.S. 649, 668 (1972)).

could “advance the Commission’s policy goal of addressing unmet needs for community oriented radio broadcasting.” *LPFM Order* at ¶ 144. Similarly, in requiring that qualifying applicants for Class A LPTV licenses air at least three hours per week of locally-originated programming, Congress emphasized the role LPTV stations have played in providing local programming to otherwise unserved or underserved communities. *See Community Broadcasters Protection Act of 1999*, P.L. 106-113, 113 Stat 1501, codified at 47 U.S.C. § 336(f)(1999).

The Commission offers no explanation why these public interest considerations are relevant to LPFM and LPTV services and not to NCE stations. As Congress has recognized, NCE licensees have traditionally aired “programming that involves creative risks and that addresses the needs of unserved and underserved audiences.” *See* 47 U.S.C. § 396(a)(6). And as the Commission has noted, NCE broadcasters’ ability to address the “diverse needs, interests, and concerns of our Nation’s people, which may be underserved by commercial broadcasting, remain[s] central to the unique service provided by Public Broadcasting.” *Revision of Programming and Commercialization Policies*, 98 FCC 2d 1076, 1116 (1984).⁶ It makes little sense for the Commission to argue that because NCE licensees have an obligation to meet the unmet needs of a larger audience than LPFM or LPTV services, consideration of locally-originated programming is irrelevant to selection of an NCE applicant.

Equally unavailing is the Commission’s conclusion that the local programming selection criterion is better suited for discussion in the ongoing digital television (“DTV”) proceeding. *Order* at ¶ 66. It is the instant proceeding, not the DTV Notice of Inquiry, that addresses the selection of NCE licensees. *NFCB/CME et al.* is not asking the Commission to require all NCE

⁶ *See also* Carnegie Commission on Educational Television, *Public Television: A Program for Action* 87 (1967) (“The heart of the system is to be the community . . . [T]he overwhelming

licenses to air a certain amount of local programming, rather NFCB/CME *et al.* is requesting that the FCC consider the provision of locally-originated programming in the selection of an applicant.

The Commission also seems to imply that LPFM will satisfy the local programming needs of the American public and therefore it should not encourage NCE applicants to provide locally-originated programming. The Commission's reliance on LPFM to meet the need for locally-originated programming is misplaced.

In this era of unprecedented concentration in the mass media industry, the need to encourage local programming in every service is greater than ever before. *See Biennial Review Report*, MM Dkt. No. 98-35 at ¶¶ 27, 53 (rel. June 20, 2000) (noting that broadcast industry has undergone significant consolidation and further concentration is expected). In the radio industry, consolidation has led to a proliferation in stations adopting cookie cutter "national" news formats instead of airing localized programming. And with respect to television, there is mounting evidence that broadcast licensees are not serving the local programming needs of their communities. *See, e.g.,* Phillip Napoli, Ph.D., *Market Conditions and Public Affairs Programming: Implications for Digital Television Policy* (March 2000).

Although the creation of LPFM will address some of these problems, the limitations of the service mean that it cannot offset the lack of local programming available to many communities. LPFM stations are only licensed to serve a very small area. In addition, many major metropolitan areas, *e.g.,* New York City, will not even be eligible for LPFM service. Nor should LPFM be required to bear the local programming burdens of all broadcasters. Thus,

proportion of programs will be produced in the stations . . . local skills and crafts will be utilized and tapped.”).

LPFM is only a partial solution to the problem and will do nothing to address the unmet needs of those communities that do not qualify for LPFM service.

It is therefore important that the Commission encourage NCE broadcasters to air locally-originated programming. Awarding NCE applicants points for promising to air such programming would further the long standing policy favoring local and locally-originated programming. In light of the Commission's inadequate explanation for departing from this precedent, the Commission should reconsider its decision and consider the local nature of an applicant's programming when selecting an NCE licensee.

II. THE COMMISSION SHOULD AWARD POINTS TO STATIONS THAT PROVIDE AIRTIME TO LOCAL RESIDENTS AS WELL AS TO STATIONS THAT ARE LOCALLY FUNDED.

In addition to awarding points for local programming, the Commission should reconsider its decision not to include points for providing airtime to local residents and locally funded stations. The Commission dismissed these proposals without any explanation whatsoever. As explained above, localism is an historical mission of broadcasters licensed by the Commission, and of noncommercial broadcasting in particular.⁷ Providing airtime to local residents and favoring stations receiving local funding will help ensure that local issues are covered and that NCE stations continue to respond to the needs of the community.

Stations that provide airtime to local residents should be rewarded. This practice promotes efficient use of the spectrum and fairness to all members of the community, including the majority of individuals who cannot receive a license to broadcast. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969). The Commission has historically

⁷ *See, e.g., Carnegie Commission Report* at 92 (1967) ("Public Television programming ... should be a forum for debate and controversy ... where people of the community express their hopes, their protests, their enthusiasms, and their will.").

considered opportunities for “local self expression” and “local talent” among “the major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission.” *1960 Programming Policy Statement* at 1913. In addition, granting access to members of the community will invariably increase the number of voices in the local media. Diversity of viewpoints, especially local ones, is increasingly important in light of the excessive consolidation in the mass media industry.

In addition, local funding is a good measure of whether a local community is receiving the programming it prefers from the licensee. This criterion would help demonstrate that the community of license actually supports the licensee. Local funding also helps ensure that the community is involved with the station and holds the station accountable to the residents.

On reconsideration, the Commission should grant points to applicants that will provide airtime for local residents and obtain local funding. These factors are easily verifiable and would help ensure that localism remains central to NCE broadcasting.

III. CONCLUSION

Localism is the foundation of the nation's broadcasting system. This emphasis on locally-originated and oriented programming has been affirmed and reaffirmed by the courts, Congress and the Commission for the last fifty years. The Commission's determination that locally-originated programming is irrelevant to applicant selection of NCE licensees is thus misguided and departs from well-established precedent without an adequate explanation. Accordingly, NFCB/CME *et al.* respectfully request that the Commission reconsider its decision and award points to NCE applicants for locally-originated programming. Moreover, NFCB/CME *et al.* ask that the Commission reconsider its decision not to award points to NCE applicants for the provision of air time to local residents and for stations that are locally funded.

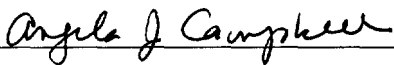
Respectfully submitted,

Of Counsel:

Fernando A. Bohorquez, Jr.
Graduate Fellow
Georgetown University Law Center

Irene Feldman
Legal Intern
University of California at Davis
Media Access Project

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Angela J. Campbell
Citizens Communications Center
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Ave. N.W., Ste. 312
Washington, D.C. 20001
202-662-9546

Cheryl A. Leanza
Andrew Jay Schwartzman
Harold J. Feld
MEDIA ACCESS PROJECT
950 18th St., NW, Suite 220
Washington, D.C. 20006
202-232-4300

Counsel for NFCB/CME *et al.*